No. 84-1330

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IN THE

Supreme Court of the United States

October Term, 1984

HARRIET M. GOULD,
Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Respondent

v.

ROBERT L. ISRAEL, et. ux. and
C. WILLIAM BAILEY, et. ux.
Defendants

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY

[redacted]

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MOTION FOR SUMMARY DISPOSITION PURSUANT TO RULE 23

Petitioner moves for Summary Disposition pursuant to Rule 23, adjudicating:

1. There is no federal jurisdiction.

2. Opinion of Ninth Circuit has no precedential value, and

remanding to the United States District Court with instructions to remand to the State Court.

BASIS FOR MOTION

Respondent has not cited any authority for removal from the State court when the requisite element of diversity of citizenship does not appear from the complaint. A true copy of the complaint is in Appendix A hereto.

AUTHORITIES

This Court has repeatedly decreed that diversity of citizenship to support federal jurisdiction must be determined from the complaint, and that involuntary dismissal of non-diverse defendants does not create federal jurisdiction.[1] This rule has been universally followed.[2]

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[1] *Whitcomb* v. *Smithson*, 175 U. S. 635, 637, 20 S.Ct 248, 44 L. Ed. 303: *Kansas CIty Suburban Belt Ry.Co.* v. *Herman*, 187 U. S. 63 at 70, 23 S.Ct. 24, 47 L. Ed. 76: *Alabama Great Southern Ry.* v. *Thompson*, 200 U. S. 206, 26 S. Ct. 161,50 L. Ed. 441; *Lathrop* v. *Inter.Const. & Imp. Co.* 215 U. S. 246 at 251; 30 S. Ct. 76, 54 L. Ed. 177: *American Car and Foundry Co.* v. *Kettelhake*, 236 U. S. 311, 35 S. Ct. 355, 59 L. Ed. 594: *Great Northern Ry. Co.* v. *Alexander* 246 U. S. 276, 38 S. Ct. 237, 62 L. Ed. 713.

[2] *DeBry* v. *Transamerica Corp.* (CA10th-1979) 601 D.2d 480 at 488 *Self* v. *General Motors Corp.* (CA9th-1978) 588 F.2d 655 at 658, *Winters Government Securities* v. *Nafi Emp. Credit*, (SD Fla-1978) 449 F.Supp. 239 at 241; *Saylor* v. *General Motors Corp.* (ED Ky-1976) 416 F. Supp. 1173 at 1175; *Warren Bros., Co.* v. *Community Building Corp. of Atlanta Inc.* (MD NC-1974) 386 F. Supp. 656 at 660; *Weems* v. *Louis Dreyfus Corp.* (CA5th-1967) 580 F.2d 545 at 547; *Ennis* v. *Queens Ins. Co of America* (WD Tenn-1973) 364 F. Supp. 964 at 966; *Continental Oil Co.* v. *PPG Industries, Inc.* (SD Tex-1973) 355 F. Supp 1183 at 1185; *Bd of Commissioners of Dade County* v. *Blount Bros. Corp.* (SD Fla-1972) 398 F.Supp. 177 at 178; *Johnson* v. *American Mut. Ins. Co.* (WD Mo 1971) 335 F. Supp. 390 at 393: *Hum* v. *Missouri Pacific R.R.* (ED Ark-1968) 292 F. Supp. 65; *Lauf* v. *Nelson* (D Mont-1956) 246 F.Supp. 307 at 311; *Squibb-Mathieson International Corp.* v. *St. Paul Mercury Ins. Co* (SD NY-1965) 238 F. Supp. 598 at 599; *Strandholm* v. *General Constr. Co.* (D Ore 1963) 222 F. Supp. 12 at 13; *Potter* v. *Carvel Stores of New York Inc.* (D MD-1962) 203 F.Supp. 462 at 467, affirmed (CA 4th-1963) 314 F.2d 45: *Robinson* v. *LaChance* (ED NC 1962) 209 F. Supp. 845; *Wisseman* v. *LaChance* (ED NC-1962) 209 F. Supp. 807 at 810; *Stone* v. *Foster* (WD Ark-1958) 163 F. Supp. 298 at 305; *Putterman* v. *Daveler* (D Del-1958) 169 F.Supp. 125.

CONCLUSION

Respondent, not having cited a single authority contrary to the mandates of this Court that diversity of citizenship must appear from the complaint, and that involuntary dismissal of non-diverse citizens does not create federal jurisdiction, and the petitioner having been unable to find any authority contrary to the mandates of this Court, further briefing appears unnecessary.

Respondent urged waiver of jurisdictional issue in the Ninth Circuit and by innuendo, makes the same argument here.

North American Transport and Trading Co. v. *Morrison*, 178 U.S. 262, 44 L. Ed.1061, 20 S.Ct 869, disposes of the waiver theory. There, plaintiff brought an action in the Superior Court for King County, Washington — by coincidence the same court in which plaintiff here instituted her action. Defendant removed, over plaintiff's objection. Judgment was rendered against defendant. Defendant moved for remand to the State Court, which District Court denied. On appeal this Court directed the District Court to remand with costs to be taxed against defendant.

If judgment had been rendered against MONY in this action, MONY could have successfully obtained remand to the State Court.

Both the lower courts have failed in their duty to *sua sponte* remand as required by *McNutt* v. *General Motors Accept. Corp.*, 80 L.Ed. 1135, 298 U.S. 178; *McNutt* v. *McHenry Chevrolet Co.*, 80 L.Ed. 1141, 298 U.S. 190. The only recourse left to petitioner to correct the dereliction of the lower courts is to appeal to this Court.

ARGUMENT

Members of this Court have publicly deplored its excessive workload. Tolerating lower courts' arrogant indifference to limitations of their jurisdiction, both statutory and by decree of this Court, is not likely to abate the problem.

Respectfully submitted,

VAUGHN E. EVANS
Attorney for Petitioner

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

HARRIET M. GOULD,
Plaintiff,
v.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
ROBERT L. ISRAEL and JANE DOE ISRAEL, his wife,
C. WILLIAM BAILEY and JANE DOE BAILEY, his wife,
Defendants.

No. 81-2-18553-3

FIRST AMENDED COMPLAINT

COMES NOW the plaintiff and for first amendment to her complaint against defendants alleges:

I.

That plaintiff is a resident of King County, State of Washington, and is the widow of Vick Gould; that plaintiff was the sole beneficiary on an accidental death insurance policy issued on the life of Vick Gould by defendant Mutual Life Insurance Company of New York.

II.

That Robert L. Israel and Linda Israel are husband and wife, and as such constitute a marital community under the laws of the State of Washington; that all acts and conduct alleged herein by Robert L. Israel were in the course of earning money for the benefit of said community; that Robert L. Israel is an attorney at law practicing in the City of Seattle and residing in King County, Washington.

III.

That C. William Bailey and Laura Jane Bailey are husband and wife and as such constitute a marital community under the laws of the State of Washington; that all acts and conduct alleged herein by C. William Bailey were in the course of earning money for the benefit of said community; that C. William Bailey is an attorney at law practicing in the City of Seattle and residing in King County, Washington.

IV.

Mutual Life Insurance Company of New York is a foreign corporation doing business in King County, State of Washington; that said defendant issued an accidental death insurance policy upon the life of Vick Gould; that said policy provided for life insurance benefits to his designated beneficiary, plaintiff, Harriet M. Gould, in the sum of Twenty Five Thousand Dollars ($25,000.00) in the event of accidental death; that all provisions of said policy excluded coverage in the event the death of the insured was suicide.

V.

That on May 27, 1976, Vick Gould was found shot to death in Robinswood Park in the City of Bellevue; that plaintiff made proper claim against defendant Mutual Life Insurance Company of New York for the death benefits on policy issued by said defendant.

VI.

That without any evidence to support a defense of suicide, defendant Mutual Life Insurance Company of New York and its attorneys and agents, Robert L. Israel and C. William Bailey, made the decision to refuse to pay the death benefits due Harriet M. Gould, assigning as the sole reason for such denial that Vick Gould took his own life; that the said defendants, Mutual Life Insurance Company of New York, Robert L. Israel and C. William Bailey, acting in consort and with common design, continued to refuse to pay the proceeds of said policy to plaintiff, which necessitated plaintiff instituting a lawsuit against Mutual Life Insurance Company of New York; that said lawsuit resulted in a judgment against Mutual Life Insurance Company of New York and in favor

of plaintiff, Harriet M. Gould; that the said defendants, acting in consort and with common design, appealed said judgment to the Supreme Court of the State of Washington; that the Supreme Court of the State of Washington affirmed the judgment of the Superior Court of the State of Washington; that in further effort to delay and deny plaintiff's right to receive the proceeds of her insurance policy, defendants, acting in consort and common design, petitioned the Supreme Court of the State of Washington for reconsideration; that the Supreme Court denied reconsideration on September 9, 1981; that the said judgment was not paid until September 29, 1981.

VII.

That the acts and conduct of defendants Robert L. Israel and C. William Bailey were not limited to services of attorneys, but included participation in and managing the wrongful and bad faith conduct as agents of Mutual Life Insurance Company of New York, including, but not limited to, making command decisions to wrongfully and in bad faith deny plaintiff's claim, initiating and approving conduct designed solely to harrass and humuliate plaintiff and cause her mental distress, with intent to intimidate plaintiff into abandoning her claim or settling for a mere fraction of the benefits to which plaintiff was entitled and for which plaintiff had paid premiums.

VIII.

That the conduct of defendants and each of them constitutes bad faith, unfair and deceptive acts and practices in the conduct of their trade and commerce in violation of the consumers protection act, RCW 19.86; that plaintiff is entitled to punitive damages and attorneys fees as provided by the act.

IX.

That the damages suffered by plaintiff will be proven at time of trial; that pursuant to RCW 4.28.360, plaintiff will set forth her damages upon the request of the defendants.

WHEREFORE plaintiff prays that she have judgment against defendants and each of them for a sum to be proved at trial, together with the costs and disbursements herein incurred, and a reasonable attorneys fee and punitive damages as provided by RCW 19.68.

DATED this 26th day of January, 1982.

VAUGHN E. EVANS
Attorney for Plaintiff